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In the Supreme Court of the United States

OCTOBER TERM, 1984

THE DOW CHEMICAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) violated the Fourth Amendment by contracting with a private company to take aerial photographs of a chemical plant from navigable airspace with standard aerial camera equipment.

2. Whether the procurement of aerial photographs of chemical plants by EPA exceeds its statutory authority.

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OPINIONS BELOW

The opinion of the district court (Pet. App. B1-B2) is reported at 536 F. Supp. 1355. The opinion of the court of appeals (Pet. App. A1-A14) is reported at 749 F.2d 307.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1984. The petition for a writ of certiorari was filed on February 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner owns and operates a large manufacturing facility in Midland, Michigan, which occupies approximately 2,000 acres in an area that is characterized by light to medium development. Petitioner's facility is also located near an airport, and commercial aircraft frequently pass over and near the property. At the Midland location, petitioner owns and operates two power plants. In late 1977 and

early 1978, enforcement officials of the Environmental Protection Agency (EPA) were gathering information concerning these power plants with the intention of bringing an enforcement action under the Clean Air Act, 42 U.S.C. 7401 *et seq.* Pet. App. A2.

In early 1978, EPA enforcement officials decided to obtain aerial photographs of petitioner's Midland power plants. They contacted EPA's Environmental Monitoring and Surveillance Laboratory (EMSL) in Las Vegas, Nevada, and ordered the photographs. EMSL, in turn, contracted with Abrams Aerial Survey Corporation (Abrams), a Midland aerial photography business, to take photographs of the Dow plant. On February 7, 1978, an Abrams employee flew over petitioner's facility and took photographs. These photographs were taken when the airplane was flying at altitudes of 12,000, 3,000, and 1,200 feet. The camera used was a Wild RC-10 aerial mapping camera with a six-inch lens and a focal length of 150 millimeters. The photographs taken at 1,200 feet show the plant at a scale of 1 inch equals 20 feet. Abrams sent the undeveloped film to EMSL by courier service. There, EPA technicians developed the film and made several prints and enlargements of the power plants. The film and enlargements were then sent to EPA's Region V enforcement office in Chicago, Illinois. Pet. App. A2-A3.

2. On March 15, 1978, petitioner brought an action for injunctive and declaratory relief against the United States and EPA. It alleged that aerial photography of its Midland plant violated its Fourth Amendment rights and deprived it of trade secret property interests in violation of the Fifth Amendment. Petitioner sought to obtain the photographs and to enjoin EPA's future use of aerial photography of the Midland plant.

On April 19, 1982, the district court granted petitioner's motion for partial summary judgment and ruled that the aerial photography violated petitioner's Fourth Amendment rights.[1] First, the court ruled that the aerial photography was an unlawful warrantless administrative search since EPA admittedly was engaged in a "quest for evidence" (Pet. App. B6). *Id.* at B5-B17. In the alternative, the district court analyzed the case under *Katz* v. *United States*, 389 U.S. 347 (1967), to determine whether petitioner had a reasonable expectation of privacy upon which EPA had infringed. It found that because petitioner had designed its plant so that some outdoor portions of the facility were in the interior, *i.e.*, not visible on the ground from the plant boundary, it had an expectation of privacy in the exterior features of those facilities located in the inner areas of its plant. The court also found that the aerial photography was visually enhanced surveillance because "EPA could later analyze [the photographs] under enlarged and magnified conditions" (Pet. App. B27). *Id.* at B17-B32. Finally, the court ruled that the "open fields" doctrine did not apply when a property owner's expectation of privacy was objectively reasonable. In this regard, the district court relied on the panel decision in *United States* v. *Oliver*, 657 F.2d 85 (6th Cir. 1981), which was subsequently reheard en banc and reversed, 686 F.2d 356 (1982), aff'd, *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984). Pet. App. B32-B38.

The district court also ruled that Section 114 of the Clean Air Act, 42 U.S.C. 7414, which grants EPA inspectors the "right of entry to, upon or through any premises" in certain circumstances impliedly excluded EPA from using other techniques, such as aerial surveillance or photography, as an investigative tool. The court ruled that Congress

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[1]Petitioner's claims under the Fifth Amendment were later dismissed without prejudice by a stipulation of the parties.

intended that "only land based inspections be utilized" (Pet. App. B44). Hence, it held that the overflights exceeded EPA's statutory authority. *Id.* at B39-B44.

3. The court of appeals reversed (Pet. App. A1-A14). Looking to whether petitioner had a reasonable expectation of privacy in the areas in question, the court concluded that no reasonable expectation of privacy was invaded in photographing from the air the "outdoor spaces of a chemical plant" (*id.* at A13). The court reasoned that petitioner had exhibited no actual expectation of privacy from aerial observation of its large industrial plant (*id.* at A7-A8). Even if it had such an expectation, moreover, the court explained that society would not deem it to be reasonable (*id.* at A9):

> When the entity observed is a multi-building complex, and the area observed is the outside of these buildings and the spaces in between the buildings, and when the complex is near an airport and within the pattern of planes landing and taking off, it is difficult to see how a reasonable person would have privacy expectations in the outside of the buildings and the spaces between the buildings.

Finally, the court of appeals reversed the district court's ruling that the flights were unlawful because EPA was not authorized by statute to use aerial photography as an investigative technique. It ruled that Congress's delegation under the Clean Air Act of general investigative authority to EPA was sufficient statutory authority to conduct aerial observation that satisfied the Fourth Amendment. *Id.* at A13-A14.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, it does not warrant review by this Court.

1.a. Petitioner contends (Pet. 11-14) that its expectation of privacy in its entire 2,000-acre Midland plant is indistinguishable from that of the interior portion of a commercial building or office and that an aerial "search" of any part of these premises therefore presumptively required a warrant. It is undeniable, however, that the outdoor features of petitioner's facility for which it claims a reasonable expectation of privacy are continuously exposed to the open sky. Overflights of the facility are a frequent occurrence, and Congress has declared "a public right of freedom of transit through navigable airspace," 49 U.S.C. App. 1304. Thus, as a practical matter, it is manifest that petitioner could not expect privacy in these areas, at least with respect to aerial observation, comparable to that in its offices.

As this Court noted in *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 4, there is ordinarily no bar to aerial surveillance of lands by the general public and, by the same token, the Fourth Amendment does not prevent aerial observation by the police. See also *United States* v. *Allen*, 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981); *United States* v. *DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980).[2] This is equally true when the observation is of areas that constitute the "curtilage" of a private building, which may be endowed with an expectation of freedom from physical intrusions. The courts have consistently found that viewing the curtilage from the air, nearby open fields, or public property, even with enhancing visual aids, does not violate the Fourth Amendment. See, *e.g.*, *United States* v. *Hensel*, 699 F.2d 18, 41 (1st Cir.), cert. denied, 461 U.S. 958 (1983); *United States* v. *Lace*, 669

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[2]Indeed, even the dissent from the en banc court of appeals' decision in *Oliver* premised its conclusion (that the entry onto private property in that case violated the Fourth Amendment) partly on the assumption that the less intrusive technique of aerial surveillance would have been valid. See 686 F.2d at 372 (Keith, J., dissenting).

F.2d 46, 49-51 (2d Cir.), cert. denied, 459 U.S. 854 (1982); *United States* v. *Minton*, 488 F.2d 37, 58 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974).[3] Thus, there is no basis for contending that viewing petitioner's plant from the air violated the Fourth Amendment.

b. Petitioner also contends (Pet. 10-11, 13) that the detail that the photographs taken for EPA were capable of revealing independently gives rise to a Fourth Amendment violation, claiming that the camera used was "sophisticated photographic equipment * * * comparable to" a wiretap (Pet. 13). This contention is without merit. Even assuming arguendo that the use of unusually sophisticated or not commercially available equipment could involve an unconstitutional privacy intrusion, there is no basis for questioning the decision below. The aerial camera used by the private contractor in this case was standard equipment available to, and used by, the public for aerial photographic purposes.[4] Aerial photography itself is generally a lawful commercial service openly conducted by private firms similar to the one EPA engaged in this case, and there was nothing extraordinary about the photographs taken in this particular case. Certainly there is no reason to think that the aerial photographs in this case were any more detailed than those routinely taken all across the country by government agencies for mapping purposes. Petitioner simply advances no reason why the enhancement of the naked eye through

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[3]The cases cited by petitioner (Pet. 13) as invalidating the use of visual aids, such as a telescope, involve viewing the inside of a dwelling. See *United States* v. *Taborda*, 635 F.2d 131, 139 (2d Cir. 1980); *United States* v. *Kim*, 415 F. Supp. 1252 (D. Hawaii 1976). Even assuming that these cases are correctly decided, they are plainly distinguishable from this one. See *United States* v. *Hensel*, 699 F.2d at 41; *United States* v. *Lace*, 669 F.2d at 51.

[4]Indeed, one of the government's expert witnesses stated that photographs showing greater detail than those taken here could be taken from a helicopter with a good quality 35 millimeter camera and a standard 70 millimeter lens. C.A. App. 310-311.

the use of standard camera equipment violates the Fourth Amendment.

In any event, petitioner throughout this litigation has focused on a different case — what details the aerial photographs were capable of revealing under magnification or enlargement -- rather than what the photographs as processed and printed by the government actually revealed. As stated at the outset, the government prepared and enlarged photographs involving the two large Midland power plants. But petitioner does not claim an expectation of privacy in the exterior of the power plants; rather, it focuses on other portions of the facility also captured in the photographs. See Pet. 11-12. The developed films in EPA's possession showed the remainder of the Midland facility at a scale of one inch equals 20 feet in photographs taken at an altitude of 1,200 feet. While these films could have been enlarged or viewed under magnification to show greater detail of petitioner's plant, EPA did not do so, and the government certainly cannot be accused of ferreting out the "minute details" of petitioner's facility by such techniques. The question whether the use of certain technology violates the Fourth Amendment depends upon the intrusion on privacy actually experienced in an individual case rather than upon the potential intrusion that the technology may be capable of producing. Compare *United States* v. *Knotts*, 460 U.S. 276 (1983) (use of beeper to track location of automobile on highway), with *United States* v. *Karo*, No. 83-850 (July 3, 1984) (monitoring of beeper in a private residence).

2. Petitioner also renews its contention (Pet. 14-16) that EPA lacks statutory authority to investigate and obtain evidence through the use of aerial photography. This contention is completely without merit.

Petitioner's argument is that Section 114(a)(2) of the Clean Air Act, 42 U.S.C. 7414(a)(2), which authorizes entry by EPA inspectors "to, upon or through any premises

* * *," impliedly forbids aerial inspection or photography. Petitioner thus attempts to convert a positive congressional grant of authority to enter premises at ground level into a prohibition on aerial inspection, which is undisputedly a substantially lesser intrusion. Clearly, there is no such negative implication in this broad grant of authority. To the contrary, when Section 114 was enacted in 1970, the intent was to expand federal officers' powers to investigate air pollution, not to restrict their powers. See 2 Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1970, for the Senate Comm. on Public Works*, 93d Cong., 2d Sess. 829 (Comm. Print 1974) (remarks of Rep. Murphy). The public is allowed to take aerial photographs (and, in fact, the photographs here were taken by a private company), and nothing in the Clean Air Act prevents EPA from using the same technique in discharging its duties.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Petitioner also raises an unfocused claim (Pet. 16-17) that the decision below somehow threatens a company's trade secrets. Whether or not it is required to do so by 42 U.S.C. 7414(c), EPA has adopted a policy of notifying companies of overflights, and the provisions of 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905 apply to any trade secrets that may be established by the companies. Certainly there can be no claim here that EPA's own use of the photographs of the power plants invades any trade secrets of petitioner.